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In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

-against-

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

What employment-related connection to a vessel in navigation is necessary for a maritime worker to qualify as a seaman under the Jones Act, 46 U.S.C.App. § 688(a)?

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STATUTES AND CONSTITUTIONAL PROVISIONS

1. Article III, Section 2 of the United States Constitution provides in pertinent part that "[t]he judicial power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction." Congress gets its power to enact admiralty and maritime legislation from the foregoing provision together with Article I, Section 8, Clause 18 of the Constitution,[1] which provides in pertinent part:

> The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

2. The Jones Act, 46 U.S.C.App. § 688(a), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

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[1] See Panama R.R. Co. v. Johnson, 264 U.S. 375, 386-87 (1924) (holding that Congress enacted the Jones Act pursuant to its powers derived from Article III, Section 2 and Article I, Section 8, Clause 18); Crowell v. Benson, 285 U.S. 22, 39 & n. 2 (1932) (indicating that Congress enacted the Longshore and Harbor Workers' Compensation Act pursuant to those same powers).

3. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G), excludes from its coverage "a master or member of a crew of any vessel."

4. The Longshore Act term "master or member of a crew of any vessel" defines the term "seaman" in the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 491 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946).

STATEMENT OF THE CASE

Plaintiff-respondent Antonios Latsis is fifty-four years old. For all of his working life he has been a licensed seaman, working on and in connection with ocean-going vessels. He received a serious eye injury – the injury in suit – while assigned in May, 1989 as a superintendent engineer to his employer's vessel the S.S. Galileo for the duration of a scheduled five-day voyage from Baltimore to Bermuda and back.[2] The injury occurred because of the negligence of the ship's doctor during that voyage. The doctor – "unlicensed in any state in the United States"[3] – suspected that Latsis had a detached retina but "neglected to follow the advice of a standard medical textbook which he had on board the vessel which read that ' . . . any patient with a suspected or established retinal detachment should be seen on an

[2] J.A. 62. Because Mr. Latsis was hurt and had to be hospitalized in Bermuda, he completed only the outbound leg and could not return with the vessel to Baltimore.

[3] Opinion below, 20 F.3d 45, 47, J.A. 218.

emergency basis by an ophthalmologist.' "[4] Injury to a seaman by an incompetent ship's physician is a classic peril of the sea.[5]

Instead of following standard medical procedure, the ship's doctor merely told Mr. Latsis to take it easy during the voyage and to see an ophthalmologist when the ship reached Bermuda.[6] The doctor prepared a "Request for Medical Treatment" form – signed by himself as well as by the ship's master and chief purser – indicating that the Bermuda ophthalmologist should "rule out detected [sic] retina please". This form designated Mr. Latsis as a "crew member" of the Galileo with the position of "supt. engineer."[7]

Latsis's background is entirely that of a seafaring man. He went to sea immediately on graduation from high school in 1959 in his native Greece, joining the Merchant Marine as a cadet.[8] Four years later he was certified as a second mate; he served in that capacity for the next sixteen months on vessels sailing throughout the world.[9] He then was appointed captain of a small Mediterranean vessel, remaining in that job for about five months.[10] Latsis then took an assignment as chief mate on

[4] 20 F.3d at 47, J.A. 218-19.

[5] See text and note 29, infra.

[6] J.A. 66-68.

[7] J.A. 78-80, 208.

[8] J.A. 32.

[9] J.A. 32-34.

[10] J.A. 35.

a larger vessel; that job lasted six months. At the conclusion of that assignment he took and passed the examination for a chief mate's license.[11]

In August 1967, Latsis married an American citizen. Later that year the couple moved to the United States, where Latsis was naturalized in December, 1967.[12] He worked in San Francisco as a ship surveyor[13] and ship's clerk[14] while continuing his education at the University of California at Berkeley, studying to become a naval architect.[15]

In 1973 Berkeley awarded Latsis a Bachelor of Science degree in mechanical engineering; in 1974, Latsis got his Master's Degree as a naval architect.[16] Latsis and his wife then moved to New York, where he was employed by the American Bureau of Shipping as a research engineer. Latsis stayed in that job for something over three years.[17] In December 1977 he left the American Bureau of Shipping job and went to work for Southern Star Shipping Company as a superintendent engineer.[18] For the next eleven years Latsis supervised Southern Star's vessels' operations and maintenance, frequently sailing with the vessels in order to perform his job.[19]

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[11] J.A. 36.

[12] J.A. 36.

[13] J.A. 37.

[14] J.A. 39.

[15] J.A. 39.

[16] J.A. 40.

[17] J.A. 42.

[18] J.A. 43.

[19] J.A. 43-45.

In September 1988 Latsis took a position with defendant-petitioner Chandris, Inc. ("Chandris"). He started as a consultant in a sort of probationary status and became a permanent employee after three months. The job title was superintendent engineer. Chandris ran a large fleet of merchant vessels, five of which operated from Atlantic ports in the United States to the Caribbean, Bermuda, and Puerto Rico.[20] Latsis's duties were not confined to any single vessel but extended over the whole fleet. "Latsis's duties included not only overseeing the vessel's engineers aboard ship and, hence, involved a number of voyages, but also planning and directing the maintenance at sea from the shore."[21] He was "required . . . to travel with various ships in the fleet from time to time. The evidence at trial was conflicting as to how much time he was actually on board ship, Latsis himself testifying that he was on voyages 72 percent of his time and his immediate boss testifying it was more like 10 percent."[22]

The S.S. Galileo was the Chandris, Inc. vessel with which Latsis was most heavily involved. The Galileo was twenty-seven years old and needed major overhauling, modifications, and refurbishment.[23] The company planned to send her to Germany to have that work done,

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[20] J.A. 48. Petitioner's Brief on the Merits (at p. 3) is somewhat misleading in indicating that there were six ships. The five were Amerikanis (J.A. 51), Azure (J.A. 119), Britanis (J.A. 109), Galileo (J.A. 51), and Victoria (J.A. 115). A sixth ship, the Horizon, did not go into service until May 1990 (J.A. 95).

[21] 20 F.3d at 48, J.A. 220. See also J.A. 48-58.

[22] 20 F.3d at 48, J.A. 220. See Latsis's testimony, J.A. 57-58; Kaparis's testimony, J.A. 179-80.

[23] J.A. 51-52.

but a great deal of preliminary inspection, study, and planning had to be accomplished first. Latsis often sailed with the Galileo in his capacity as superintendent engineer in order to help plan the overhaul. In late 1988 or early 1989 Latsis sailed with the Galileo from Miami to Mexico and return, a five-day trip.[24] In early May, 1989, he sailed with the Galileo on a two-day cruise out from Baltimore and back.[25]

Then we come to the voyage in suit. On May 14, 1989, Latsis sailed with the Galileo from Baltimore, bound for Bermuda. Quite busy until the very moment the ship left the dock, Latsis tried to ignore the central vision disturbance that began to trouble him that morning aboard the vessel. When the vessel sailed, he saw the ship's doctor, who diagnosed a suspected detached retina but failed to follow standard medical practice for treating that condition.[26] The result has been that Latsis has lost 75% of the vision in his right eye;[27] the eye is also disfigured and relatively immobile.[28] As the court below noted, this injury resulted from a classic peril of the sea: A seaman at sea with a medical emergency is helplessly reliant on the ship's doctor. If that doctor "is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling."[29]

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[24] J.A. 51, 53.

[25] J.A. 62.

[26] J.A. 64-67, 208.

[27] J.A. 83.

[28] J.A. 92-93.

[29] 20 F.3d at 55, J.A. 239.

The details of the voyage, injury, and medical treatment are significant. Latsis was aboard the vessel in the port of Baltimore, preparing for the voyage, when he began having the problem with the vision in his right eye. He first noticed this at about noon on Sunday, May 14.[30] He was too busy to see the ship's doctor until the vessel sailed at about 4:30 p.m.[31] The doctor diagnosed a suspected detached retina but did not follow elementary medical procedure, which would have been to direct Mr. Latsis to see an ophthalmologist immediately, "on an emergency basis".[32] This could easily have been done: the vessel took eleven hours to get from Baltimore to the open sea, and at any time during that period Mr. Latsis could have been taken off the vessel by pilot boat and transported to shore for medical attention.[33]

The vessel reached the open sea at about 3:30 a.m. on Monday, May 15.[34] Mr. Latsis suffered with the eye during the voyage to Bermuda. The vessel docked in Bermuda at about 11:00 a.m. on Tuesday, May 16.[35] Mr. Latsis saw an eye doctor in Hamilton, Bermuda, at about 1:15 that day, and was in the hospital being prepared for surgery by 5:00 that afternoon.[36] The surgery was done the morning of Wednesday, May 17.[37] Mr. Latsis remained

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[30] J.A. 64.

[31] J.A. 64-65.

[32] 20 F.3d at 47, J.A. 218-19.

[33] J.A. 68-69.

[34] J.A. 69.

[35] J.A. 71-72.

[36] J.A. 73-74, 76-77.

[37] J.A. 77.

in the hospital until May 22[38] and then returned home to convalesce.

After a six-week period[39] of recuperation, Latsis resumed his duties. On September 30 he sailed with the Galileo from Philadelphia to Bremerhaven, Germany, where the overhaul was to occur. This voyage took fourteen days.[40] Latsis worked on the Galileo at the drydocks in Bremerhaven for six months, "[e]very day, seven days a week, from morning to about 11 o'clock in the evening."[41] When the Galileo emerged – remodeled and with a new name, the S.S. Meridian – Latsis sailed with her from Bremerhaven to Florida, another fourteen-day crossing.[42] Thereafter he continued to work for Chandris, Inc. During the period after the Galileo/Meridian conversion was completed, Latsis continued to work as a superintendent engineer, frequently sailing on the company's vessels between Atlantic ports in the United States and ports in the Caribbean.[43] His employment with Chandris was terminated in November, 1990.

Latsis brought this Jones Act suit in October, 1991. The trial judge gave a seaman status instruction following Fifth Circuit rather than Second Circuit law.[44] Although

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[38] J.A. 83-85.

[39] Petitioner's Brief on the Merits (at p. 6) is mistaken in stating that the recuperation period was three months. See J.A. 88, 123.

[40] J.A. 89, 133-34.

[41] J.A. 92.

[42] J.A. 94-95, 135.

[43] J.A. 107, 115, 119, 127, 144, 147, 155-57.

[44] See J.A. 210-11, 232.

advising the jury of the parties' stipulation that Latsis's . . . "work aboard these ships was a contribution to the functioning of the vessel and assisted in the accomplishment of its various missions"[45] the trial judge went on to rule that the Galileo was "out of navigation" as a matter of law during her six months in drydock in Bremerhaven[46] and charged the jury to ignore Latsis's services to the vessel during that period. The jury returned a verdict that Latsis was not a seaman. The Second Circuit reversed, holding that the trial judge had committed plain error in using Fifth Circuit seaman status law rather than Second Circuit seaman status law. The Second Circuit also held that the trial judge erred in telling the jury not to consider Latsis's services to the Galileo during her six months in dry dock in Germany as bearing on whether he had a substantial work connection with the ship.

SUMMARY OF ARGUMENT

For purposes of the injuries in suit, Mr. Latsis was a Jones Act seaman as a matter of law. This Court's recent unanimous decision in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), strongly supports the view that injuries incurred during a sea voyage by a worker assigned to the vessel for the duration of that voyage and working in furtherance of the vessel's mission are

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[45] 45 J.A. 211.

[46] J.A. 210: "In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation."

squarely within the protection of the Jones Act. Others of this Court's seaman status decisions are in accord, as are the decisions of the courts of appeals. This Court should therefore affirm the decision of the Second Circuit in this case – remanding the case for trial on the merits of Mr. Latsis's Jones Act claim – but should modify that decision to provide that the jury should be instructed that Latsis was a Jones Act seaman. This resolution is particularly appropriate where – as is true here – the worker was hurt by a classic peril of the sea and the defendant employer has acknowledged that the injured worker was a member of the crew of the vessel on which he was hurt.

In the alternative, this Court should affirm the decision below and order the case remanded for trial under proper jury instructions on the seaman status issue. Such a determination would be appropriate on either of two independently sufficient bases. First, the trial judge's ruling that the S.S. Galileo was out of navigation as a matter of law during her six months in drydock in Germany – and that consequently the jury must ignore Latsis's services to the vessel during that period – was strenuously objected to by the plaintiff. That ruling violated this Court's decisions in *Wilander*, *Butler v. Whiteman*, 356 U.S. 271 (1958) (*per curiam*), and *Senko v. LaCrosse Dredging Corporation*, 352 U.S. 370 (1957). *Wilander* makes clear that a worker's services in getting a vessel ready for its mission should count toward seaman status. *Butler* and *Senko* show that it was wrong to hold that the S.S. Galileo was out of navigation as a matter of law. *Senko* upheld seaman status for a handyman on a dredge that had never moved the entire time the man worked on it. *Butler* held that it was error to rule that an out-of-commission tugboat – immobile at dockside for more than ten months, without

Coast Guard certificate, crew, earnings, or movement of any kind – was out of navigation as a matter of law. The S.S. Galileo was far more meaningfully "in navigation" during her drydock period than were the vessels involved in *Senko* and *Butler*.

The final basis for affirming the Second Circuit's decision in this case gets to the most potentially far-reaching issue in this case: the clash between the Second Circuit's and Fifth Circuit's approaches to determining seaman status. The court below reversed the trial judge for having followed Fifth Circuit rather than Second Circuit law in this respect. This case affords the Court an excellent opportunity to clarify the general law of seaman status by approving the Second Circuit's test for seaman status as set forth by the court below:

> [T]he test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.[47]

The Fifth Circuit's current test for seaman status is in sharp contrast. It omits any reference to exposure to hazards of the sea and relies instead on a concatenation of confusing rules all of which rest uneasily upon the illusory comforts of quantification: Today the courts of

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[47] 20 F.3d at 57, J.A. 245.

the Fifth Circuit are required to try to count the injured worker's hours or days of contact with a vessel or vessels, to count the number of vessels with which the worker has been involved, and frequently to count the number of "vessel" and "nonvessel" attributes of the apparatus on which the worker was hurt. The result of these quite unsuccessful efforts to quantify seaman status law has been widespread confusion and frustration among the trial judges and practitioners in the Fifth Circuit who handle these cases on virtually a daily basis. Even the present defendant and its supporting amici curiae agree that the Fifth Circuit's law of seaman status is in disarray. The Second Circuit's test is far less prolix and confusing than the Fifth's. The Second Circuit's test is also faithful to the policy of the Jones Act as articulated in this Court's recent decisions in *Wilander* and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991), whereas the Fifth's demonstrably is not. The Second Circuit's test should be approved.

ARGUMENT

I. UNDER ANY OF THE EXTANT TESTS FOR SEAMAN STATUS, A WORKER ASSIGNED TO A VESSEL FOR THE DURATION OF A SEA VOYAGE AND WHOSE DUTIES CONTRIBUTE TO THE VESSEL'S MISSION IS A JONES ACT SEAMAN RESPECTING INJURIES INCURRED ON THAT VOYAGE.

In *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), this Court quoted with approval a standard admiralty treatise:

> The term mariner includes all persons employed on board ships and vessels *during the voyage* to assist in their navigation and preservation, or to promote the purposes of the voyage.[48]

This was not isolated language; the whole thrust of the *Wilander* opinion was that "sea-based maritime workers . . . who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."[49] This Court quoted approvingly from a 1916 decision of the Southern District of New York:

> [E]very one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship *when she is upon a voyage*.[50]

The *Wilander* opinion concludes by stating:

> The inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel, and the employee's *precise relation* to it. * * * "The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the *activity in which he was engaged at the time of injury*."[51]

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[48] 498 U.S. at 344 [quoting E. Benedict, American Admiralty § 278, p. 158 (1850)] (*Wilander* Court's italics omitted; emphasis added).

[49] 498 U.S. at 347.

[50] 498 U.S. at 352 [quoting Norton v. Warner Co., 321 U.S. 565, 572 (1944); *Norton* in turn was quoting The Buena Ventura, 243 F. 797, 799 (S.D.N.Y.1916)] (emphasis added).

[51] 498 U.S. at 356 [quoting Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190 (1952)] (emphasis added).

Wilander's language thus supports the view that any worker who is assigned to a vessel for the duration of a voyage and whose duties contribute to the vessel's mission must be classified as a seaman respecting injuries incurred on that voyage. So does the *Wilander* decision's central policy thrust. At the core of *Wilander* is the Court's recognition that the purpose of the Jones Act is to protect workers against the "special hazards"[52] and "particular perils"[53] characteristic of work on vessels at sea. As the court below was careful to point out, Mr. Latsis's injury resulted from "such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician. If that physician is unqualified or engages in medical malpractice, it is just as much a peril to the mariner on board as the killer wave, the gale or hurricane, or other dangers of the calling."[54]

The view that a worker hurt while working to further the mission of a vessel and assigned to that vessel for the duration of a sea voyage is entitled to the protection of the Jones Act[55] is fully consistent with this Court's other

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[52] 498 U.S. at 354 [quoting Chief Justice Stone's dissent in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104 (1946)].

[53] 498 U.S. at 354.

[54] 20 F.3d at 55, J.A. 239.

[55] If such a worker is not protected by the Jones Act, he may have little protection indeed. The Second Circuit's recent decision in Kollias v. D & G Marine Maintenance, 29 F.3d 67 (CA2 1994) holds that the Longshore and Harbor Workers' Compensation Act can apply to injuries on the high seas. This is a highly debatable holding because of language in the Longshore Act limiting its coverage to "navigable waters of the United States." 33 U.S.C. § 903(a). A petition for certiorari is pending in *Kollias*. If it turns out that the Longshore Act cannot redress an injury at sea, that will be all the more reason for insisting that the Jones Act must cover injuries like that sustained by Antonios Latsis.

seaman status decisions.[56] It is also broadly consistent with the seaman status jurisprudence of the courts of appeals.[57] This view provides a ready basis for resolving

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[56] See Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 112 S.Ct. 486, 494 (1991) ("Because a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission – even one used exclusively in ship repair work – that worker may qualify as a Jones Act seaman."); Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 373 (1957) (upholding seaman status for a handyman on a stationary dredge and stating that "the jury could reasonably have believed that petitioner would have [nautical] responsibilities in the event that this dredge were moved. Whether petitioner would be a member of the dredge's crew while taking soundings during a trip is certainly a jury question. If he were a member during travel, he would not necessarily lack that status during anchorage."); Norton v. Warner Co., 321 U.S. 565, 567, 568 (1944) (holding that a bargeman was excluded from Longshore Act coverage by its "member of a crew of any vessel" language and emphasizing as particularly relevant the worker's duties while the barge was "being towed" or "in tow"); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 255, 260 (1940) (holding that a deckhand on a lighter used to provide coal to steamboats was not excluded from Longshore Act coverage by its "member of a crew" language and stressing that the worker "had no duties while the boat was in motion"); Warner v. Goltra, 293 U.S. 155, 157 (1934) (holding that the master of a river tug was a Jones Act seaman and stating: "In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage.' ") [quoting The Buena Ventura, 243 F. 797, 799 (S.D.N.Y.1916)].

[57] Decisions in the First, Fifth, and Sixth Circuits provide explicit support for the view that a worker hurt during a voyage while assigned to further the vessel's mission for the duration of that voyage must be classified as a seaman. See DiGiovanni v.

the present case, one that does not require this Court to lay down any new law or to choose between the conflicting tests for seaman status of the Second and Fifth Circuits. Should this Court adopt this view, the proper disposition of this case would be a ruling as a matter of law that Latsis was a Jones Act seaman – it is undisputed that he was assigned to the Galileo for the full voyage, that he is suing for an injury incurred aboard the vessel on that voyage, and that his work contributed to the vessel's mission or function[58] – with a remand for trial on

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Traylor Brothers, Inc., 959 F.2d 1119, 1123 (CA1 1992), cert. denied, 113 S.Ct. 87 (1992) ("if a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit.") (emphasis in original); Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 243, 245, 248 (CA5 1983), cert. denied, 464 U.S. 1069 (1984) (upholding seaman status for workers who performed "classical seaman's work" on a miscellany of small boats on very short voyages and relying in major part on the fact that each of "plaintiffs' tour[s] of duty with a vessel was for the duration of the vessel's mission.") See also Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 262 (CA5 1981) ("Roberts was apparently expected to stay aboard the barge until completion of the project."); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 281-82 (CA5 1981); Davis v. Hill Engineering, Inc., 549 F.2d 314, 328 n. 23 (CA5 1977) ("Davis . . . continued his work on Hill's fabrication project after the onshore phase was completed by boarding the W-701 for the duration of the project."); Hatch v. Durocher Dock and Dredge, Inc., 33 F.3d 545, 547 (CA6 1994) (adopting the rule of the First Circuit's *DiGiovanni*, supra). The law in the other circuits is broadly consistent. For a complete presentation of the relevant cases from all of the circuits, see Appendix A, infra.

[58] See J.A. 211: "The parties have agreed that the work of the plaintiff aboard these ships was a contribution to the

the merits of his Jones Act negligence claim. Such a ruling would seem especially appropriate where, as was true here, the worker was hurt by a classic peril of the sea. Such a ruling would find additional support in the fact that defendant has actually acknowledged Mr. Latsis's status as a seaman for purposes of the relevant voyage. See Section II, below.

II. DEFENDANT HAS ACKNOWLEDGED THAT MR. LATSIS WAS A MEMBER OF THE CREW OF THE S.S. GALILEO.

It is common ground that a Jones Act "seaman" is defined as "a master or member of a crew of any vessel." *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 491 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991); *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 7 (1946); David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, 86, 93 (1985). Defendant Chandris has acknowledged that Mr. Latsis was a member of the crew of the vessel Galileo at the time of his injury. On May 14, 1989 – the day the vessel left Baltimore and the ship's doctor examined Mr. Latsis's eye – the master, chief purser, and physician of the Galileo all signed a "Request for Medical Treatment" form describing Mr. Latsis as a "crew member" with the position of "supt. engineer."[59]

Evidence that an employer has treated an injured maritime worker as a seaman is highly probative that the

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functioning of the vessel and assisted in the accomplishment of its various missions."

[59] J.A. 208.

worker is indeed a seaman. See *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 367-68 (CA5 1982) (holding that evidence that the employer paid maintenance and cure to the injured worker was relevant to the Jones Act seaman status issue).

III. IN THE ALTERNATIVE: MR. LATSIS IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL JUDGE ERRED IN RULING THAT THE S.S. GALILEO WAS OUT OF NAVIGATION AS A MATTER OF LAW WHILE IN DRYDOCK AND IN CHARGING THE JURY TO IGNORE LATSIS'S SERVICES TO THE S.S. GALILEO IN DRYDOCK.

The trial judge told the jury: "In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation."[60] Plaintiff timely objected.[61] The court below determined that the "drydock instruction"[62] was erroneous. If this Court does not conclude (on the basis of points I and II above) that Latsis was a seaman as a matter of law, then it

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[60] J.A. 210. The trial judge did not explain the basis for this ruling but evidently relied on McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567 (CA9 1992). That case is readily distinguishable: A shipyard worker was hurt in a fire involving the hull of an oil drill ship that was being transformed into a fish processing ship – a seventeen-month-long project. That situation is a far cry from the present case, where the plaintiff was hurt by a classic peril of the sea during a sea voyage.

[61] 20 F.3d at 49, J.A. 224.

[62] 20 F.3d at 55, J.A. 238.

should affirm the decision below – reversing and remanding for a new trial on seaman status – because the trial court's handling of the drydock issue squarely conflicted with three of this Court's decisions.

The court below determined that the drydock instruction was erroneous because it conflicted with this Court's decision in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991).[63]

In this determination the court below was correct. The *Wilander* Court expressly approved the portion of *Offshore Co. v. Robison*, 266 F.2d 769, 779 (CA5 1959) holding that a seaman is one whose duties "contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." The unanimous *Wilander* Court stated:

> [W]e believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.[64]

As the court below noted, a large chunk of Latsis's work for Chandris was taken up with contributing to the mission of the S.S. Galileo:

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[63] 20 F.3d at 55-56, J.A. 239-41.

[64] 498 U.S. at 355.

> During the course of Latsis's employment with Chandris . . . he spent some six months working seven days a week on board the vessel, supervising the project as the only naval architect, including the drydocking, bottom removal, cleaning and removal of the propellers, overhauling the main engines, rebuilding the boilers, and reconstructing the accommodation spaces and public rooms.[65]

The court below went on to say: "Why this time should not count in terms of determining the substantiality of his connection to the Chandris vessels, we do not know."[66]

Reversing on the basis of the trial judge's handling of the drydock issue was also correct on the further basis that the trial judge's ruling the Galileo out of navigation as a matter of law conflicted with this Court's decision in *Butler v. Whiteman*, 356 U.S. 271 (1958) (*per curiam*). In *Butler* the plaintiff sought to establish seaman status on the basis of her deceased husband's connection with the tug G.W. Whiteman. The deceased was "employed as a laborer doing odd jobs around respondent's wharf, and on the morning of the accident he had been engaged in cleaning the boiler of the tug."[67]

On the day of the accident and for the preceding ten months of decedent's employment by the defendant, the tug had been immobilized at defendant's dock – without the requisite Coast Guard operating certificate, without crew, without earnings, and without movement of any kind. Reversing a directed verdict for the defendant, this

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[65] 20 F.3d at 55-56, J.A. 240.

[66] 20 F.3d at 56, J.A. 240-41.

[67] *Butler*, 356 U.S. at 272 (Harlan, J., dissenting).

Court held that the record "presented an evidentiary basis for jury findings as to (1) whether or not the tug G.W. Whiteman was in navigation; [and] (2) whether or not the petitioner's decedent was a seaman and member of the crew of the tug within the meaning of the Jones Act."[68] Clearly under *Butler* the district judge in the present case erred by holding that the S.S. Galileo was "out of navigation" as a matter of law.

The trial judge's handling of the drydock issue was also clearly wrong under this Court's decision in *Senko v. LaCrosse Dredging Corporation*, 352 U.S. 370 (1957). The *Senko* plaintiff was a handyman on a dredge that had never moved during his entire period of employment. The dredge "was anchored to the shore at the time of petitioner's injury and during all the time petitioner worked for respondent. It is also true that this dredge, like most dredges, was not frequently in transit."[69]

Nevertheless, this Court upheld the handyman's seaman status because his "duty was primarily to maintain the dredge during its anchorage and for its future trips, and . . . he would have had a significant navigational function when the dredge was put in transit."[70]

Under *Wilander* it was wrong for the district court to rule Latsis's services to the Galileo in drydock out of consideration; these services bore significantly on the issue of Latsis's "contribut[ion] to the function of the vessel or to the accomplishment of its mission." Under *Butler* and *Senko* it was wrong for the district court to rule

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[68] 356 U.S. at 271. Citations and italics omitted.

[69] *Senko*, 352 U.S. at 372.

[70] Id. at 374.

that the S.S. Galileo was "out of navigation" as a matter of law: The Galileo was obviously much more "in navigation" during her time in Bremerhaven than were the wholly immobile and out-of-commission vessels involved in those two cases. The trial court's erroneous handling of the drydock issue therefore provides an independently sufficient basis for upholding the decision below.

IV. CHOOSING A TEST FOR SEAMAN STATUS: THE SECOND AND FIFTH CIRCUITS' CONFLICTING APPROACHES.

In *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355 (1991), this Court held that "[t]he key to seaman status is employment-related connection to a vessel in navigation." The Second and Fifth Circuits disagree as to the nature of the required connection. Presumably certiorari was granted in this case to resolve that conflict.

In the decision below, the Second Circuit held that the district court committed plain error by charging the jury with a definition of seaman status taken from Fifth Circuit jurisprudence;[71] the district judge should have used the Second Circuit's test for seaman status, not the Fifth's. Under the Second Circuit's test as phrased in *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (CA2 1975), the worker must have "a more or less permanent connection with the ship." The court below determined that *Salgado* "remains the law of this circuit"[72] but is in need of clarification in light of this Court's decisions in

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[71] See 20 F.3d at 46, 52, 54-55; J.A. at 216-17, 232, 237-38.

[72] 20 F.3d at 46, J.A. 216.

Wilander and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991).[73]

The necessary clarification produced a test for seaman status that could be formally set forth as follows:

> We reiterate that after *Wilander* and *Gizoni* the test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.[74]

As the court below explained, the current Fifth Circuit test is "quite different."[75] The Fifth Circuit's test contains no reference to the worker's exposure to the hazards of the sea. Instead, it relies centrally on a relatively rigid requirement that the plaintiff have been "assigned permanently to a vessel . . . or [have] performed a substantial part of his work on the vessel."[76] In the Fifth Circuit nowadays, this requirement is interpreted "primarily, if not solely, in temporal terms."[77]

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[73] 20 F.3d at 56, J.A. 241.

[74] 20 F.3d at 57, J.A. 245.

[75] 20 F.3d at 52, J.A. 233.

[76] 20 F.3d at 54, J.A. 236, quoting Offshore Co. v. Robison, 266 F.2d 769, 779 (CA5 1959).

[77] 20 F.3d at 54, J.A. 236.

In this section of his brief plaintiff-respondent Antonios Latsis will show that the Second Circuit's approach to determining seaman status is superior to the Fifth's in three ways: (a) the Second Circuit's approach is faithful to this Court's *Wilander* and *Gizoni* decisions, whereas the Fifth Circuit's is not; (b) the Second Circuit's approach furthers the policy of the Jones Act, whereas the Fifth Circuit's thwarts it; and (c) the Second Circuit's test is much less prolix and confusing than the Fifth's.

A. The Decision Below is Faithful to Wilander and Gizoni

In the decision below the Second Circuit held that the trial judge erred in charging the jury that a worker seeking Jones Act seaman status must prove that he "was either permanently assigned to the vessel or performed a substantial part of his work on the vessel."[78] In the unanimous[79] view of the panel, the quoted language was erroneous for three reasons: (a) it was impermissibly narrower than the Second Circuit's longstanding test for seaman status, which had been satisfied with a showing that the injured worker had a "more or less permanent connection" with the vessel;[80] (b) by focusing the trier of

[78] 20 F.3d at 49, J.A. 223-24.

[79] Judge Kearse's dissent was on other grounds; she expressly agreed with the test for seaman status laid down in Judge Oakes's opinion. See 20 F.3d at 58, J.A. 246-47.

[80] See 20 F.3d at 46, J.A. 216-17: "[T]he 'more or less permanent connection' requirement articulated in Salgado [v. M.J. Rudolph Corp., 514 F.2d 750, 755 (CA2 1975)] remains the law of this circuit. In ignoring this formulation and adopting an

fact's inquiry solely on the worker's "temporal relation to the vessel"[81] it risked "frustrating the underlying policy of the Jones Act";[82] and (c) it did not reflect the principles articulated in this Court's *Wilander* and *Gizoni* decisions.[83] The court below went on to formulate a test for seaman

alternative formulation, the district court misapplied the law and committed plain error. This error resulted in substantial prejudice to Latsis because the jury was effectively instructed to determine the substantiality of Latsis's connection to the vessel solely on the basis of Latsis's temporal relationship with the vessel."

[81] 20 F.3d at 54, J.A. 237.

[82] 20 F.3d at 55, J.A. 238. The court below held that the jury charge was wrong both because it used the language of "permanent assignment or substantial work" and because it stated that Latsis's time with the vessel while it was in drydock did not count. The language at 20 F.3d 55, J.A. 238, addressed both features of the charge: "[T]his instruction *further emphasized* the putative seaman's temporal connection to the vessel at the risk of confusing the jury and frustrating the underlying policy of the Jones Act." (Emphasis added.)

[83] See 20 F.3d at 51, J.A. 230: "The [*Wilander*] Court did not adopt the *Robison* test in its entirety. Indeed, the Court cited, with apparent approval, the Robertson article [David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985)] which called for revision of the *Robison* test, stating that '[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.' [498 U.S. at 354]." See also 20 F.3d at 57, J.A. 243-44: "[T]he Fifth Circuit's adherence to a narrowly interpreted permanent assignment requirement has been criticized by the Supreme Court of Louisiana .... *Folse v. W. Atlas Int'l, Inc./Downhole Seismic Servs.*, 593 So.2d 341 (La.1992). * * * The [*Folse*] majority pointed out that *Wilander* did not mention more or less permanent attachment to a vessel or fleet of vessels, and that *Gizoni* cast further doubt on this requirement. . . . "

status (quoted above at footnote 74) that it believed *was* consistent with the principles of *Wilander* and *Gizoni* and with the policy of the Jones Act.

Notwithstanding the Second Circuit's careful efforts to articulate a seaman status test conforming to the principles of *Wilander* and *Gizoni*, defendant/petitioner attacks the decision below as inconsistent with *Wilander*. The attack is based centrally on language in the *Wilander* opinion stating that "land-based" workers are not Jones Act seamen. Parenthetically it should be noted that such language – if read in the woodenly literal way the defendant would have the Court read it – would result in eliminating virtually all Jones Act seamen; almost every sailor on earth is "land-based" in the sense that somewhere there is a terrestrial home to which the sailor repairs when not at sea.

More to the point, defendant is taking the *Wilander* "land-based" language out of context. This Court's post-*Wilander* decision in *Gizoni* alone makes that apparent. The *Gizoni* plaintiff worked for a ship repair facility in California. He spent his days there and went home to a safe bed ashore each night. He was held entitled to assert his seaman status because he worked on floating platforms that sometimes moved among vessels under repair at berths or in drydocks.[84] Clearly the *Gizoni* plaintiff was "land-based" in the present defendant's overly literal sense of the term. But he was not a "land-based" worker in the sense that the *Wilander* Court used the term.

The *Wilander* Court introduced the category of "land-based maritime workers" in the following passage, which

[84] See 112 S.Ct. at 489-90, 494.

explains that the Longshore and Harbor Workers Compensation Act (LHWCA) defined the Jones Act term "seaman" when it excluded from the coverage of the LHWCA "a master or member of a crew of any vessel":[85]

> In *International Stevedoring Co. v. Haverty*, 272 U.S. 50, (1926), the Court held that a stevedore is a "seaman" covered under the [Jones] Act when engaged in maritime employment. Haverty was a longshore worker injured while stowing freight in the hold of a docked vessel. The Court recognized that "as the word is commonly used, stevedores are not 'seamen.' " "But words are flexible. . . . We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

> Congress would, and did, however. Within six months of the decision in *Haverty*, Congress passed the . . . LHWCA. . . . The Act provides recovery for injury to a *broad range of land-based maritime workers* but explicitly excludes from its coverage "a master or member of a crew of any vessel." * * * "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

> With the passage of the LHWCA, Congress established a *clear distinction between land-based and sea-based maritime workers*. The latter, who

[85] 33 U.S.C. § 902(3)(G).

> owe their allegiance to a vessel and not *solely* to a land-based employer, are seamen.[86]

The foregoing passage shows that the *Wilander* Court used the term "land-based maritime workers" to refer to workers like Haverty: longshoremen or stevedores, whose involvement with ships is confined to loading and unloading stationary vessels moored to docks or anchored in quiet harbors. Mr. Latsis was clearly not a "land-based worker" in the *Wilander* Court's sense of the term.[87]

That the defendant's argument takes the *Wilander* "land-based" language out of context is made all the more apparent by the key passage in the *Wilander* opinion in which the Court's holding is set forth:

> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that *distinguish between land-based and sea-based maritime employees*. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that *"seaman" had been taken to include land-based employees*. There is no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea . . . .
>
> In his dissent in [Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872 (1946), which

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[86] 498 U.S. at 346-47. Emphasis added. Some citations omitted.

[87] As the court below pointed out, the principal importance of *Gizoni* in the present context is its omission of any requirement that the injured worker have a "permanent attachment" to a vessel. 20 F.3d at 57, J.A. 244.

> extended the general maritime law remedy of unseaworthiness, traditionally restricted to seamen, to longshoremen] Chief Justice Stone chastised the Court for failing to recognize the *distinct nature of land-based and sea-based employment*. Traditional seamen's remedies, he explained, have been "universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the *special hazards and disadvantages to which they who go down to sea in ships are subjected." It is this distinction that Congress recognized in the LHWCA and the Jones Act*. It also explains why all those with that "peculiar relationship to the vessel" are covered under the Jones Act, regardless of the particular job they perform.
>
> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. *All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed*. See generally [David W.] Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985).[88]

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[88] 498 U.S. at 353-54. Emphasis added. Some citations omitted. The central premise of the Robertson law review article was this: "Exposure to the 'perils of the sea' and to risks attending the movement of vessels on navigable water are the

This key passage from *Wilander* confirms that in the Court's use of the term a "land-based employee" is someone like Haverty – an employee whose work does not confront him with the "special hazards" and "particular perils" to which seamen are subjected. It also shows that a worker like Latsis must be regarded as "sea-based": sea-based workers are those whose work regularly exposes them to the perils of the sea. The court below was careful to point out that "Latsis's employment did expose him to the perils of the sea – in fact, his injury was the result of such a peril in the sense that while on board a seaman is very much reliant upon and in the care of the ship's physician."[89]

The most important aspect of the opinion below is its careful attention to "the underlying policy of the Jones Act."[90] The *Wilander* opinion was the guiding light of the court below in that respect. In *Wilander*, this Court said that protecting seamen against the "particular perils" and "special hazards" characteristic of their work *is* the Act's

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distinguishing characteristics of a seaman's work." 64 Texas L. Rev. at 80. Professor Robertson argued that the courts should adopt a "new approach [to determining seaman status whereby] a worker would be a seaman (1) when a substantial part of his duties are performed on vessels, and (2) his work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable water." Id. at 120. For a description of Professor Robertson's proposal as "simplifying the [seaman status] inquiry," see Jack L. Allbritton, Seaman Status in *Wilander's* Wake, 68 Tulane L. Rev. 373, 379 n. 51 (1994). See also Id. at 374 n. 7. Elsewhere in the same article Mr. Allbritton appears to criticize Professor Robertson's proposal as "simplistic". Id. at 390 n. 114, 397.

[89] 20 F.3d at 55, J.A. 239.

[90] Id.

underlying policy.[91] The court below said exactly the same thing: "[T]o compensate those injured in the course of work exposing them to the perils of the sea" is "the spirit of the Jones Act."[92] Accordingly, the court below made regular exposure to "the hazards of the sea"[93] the fourth element of its four-part test for seaman status. The defendant's brief to this Court seeks to foster the impression that the third element of that four-part test – requiring the worker to show that his contribution to the vessel was substantial in terms of duration or nature – is its most important feature. No one who reads the opinion below with an unbiased eye could think that. In truth, all four elements of the new Second Circuit test are important, but it seems clear that the most important is the fourth – the hazards of the sea requirement. The entire thrust of the opinion below is that *Wilander* mandates careful focus on whether "the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea."[94] In addition to relying on this Court's language so stating, the opinion below repeatedly refers to David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985)[95] – and to this Court's apparently approving reference to that law review article in *Wilander*.[96] (As will be seen in Section

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[91] This is the entire thrust of the passage quoted above at note 88.

[92] 20 F.3d at 55, J.A. 239.

[93] Id. at 57, J.A. 245.

[94] Id.

[95] See 20 F.3d at 50, 51, 53 n. 3, 57, J.A. 226, 230, 233 n. 3, 243.

[96] See 20 F.3d at 51, J.A. 230, referring to *Wilander*, 498 U.S. at 354-55.

V-D, infra, the defendant's brief to this Court also relies heavily on the Robertson article in formulating a proposed test for seaman status with which the plaintiff largely agrees.) The central premise of Professor Robertson's article is that whether an injured worker's "work regularly or significantly exposes him to the perils of the sea or to dangers attending the movement of vessels on navigable water"[97] should be the key element of the court's approach to determining seaman status.

B. The Fifth Circuit's Approach is Inferior

Judge Oakes's opinion for the court below spelled out the key difference between the Second and Fifth Circuit approaches: The current Fifth Circuit approach "frames the substantial connection issue primarily, if not solely, in temporal terms,"[98] whereas in the Second Circuit "the substantial connection requirement has not been interpreted . . . in a narrow temporal sense."[99] The trial judge's instruction in the present case was plain error because it turned the substantial connection issue "solely on the basis of Latsis's temporal relationship with the vessel."[100]

The Fifth Circuit's test was not always so narrowly and exclusively temporal. Until the 1986 en banc decision in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (CA5 1986), the Fifth Circuit used a "more or less permanent

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[97] 64 Texas L. Rev. at 120.

[98] 20 F.3d at 54, J.A. 236.

[99] 20 F.3d at 53, J.A. 234.

[100] 20 F.3d at 46, J.A. 217.

connection" approach and a "permanent assignment/substantial work" approach more or less interchangeably on the view that they were functionally identical.[101] In the pre-*Barrett* era the Fifth Circuit repeatedly stressed that "the word permanent has never been assigned a literal interpretation under the Jones Act and should not be given a wooden application, but rather, is to be used

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[101] Beginning with Offshore Co. v. Robison, 266 F.2d 769, 779 (CA5 1959), the test was normally phrased as requiring the putative seaman to have been "assigned permanently to a vessel . . . or [to have] performed a substantial part of his work on the vessel." But almost equally often the court used the "more or less permanent" phrasing. See e.g. Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 243-44 & n. 8 (CA5 1983), cert. denied, 464 U.S. 1069 (1984); McDermott, Inc. v. Boudreaux, 679 F.2d 452, 455 (CA5 1982); Barrios v. Engine & Gas Compressor Services, Inc., 669 F.2d 350, 352 (CA5 1982); Watkins v. Pentzien, Inc., 660 F.2d 604, 606 (CA5 1981), cert. denied, 456 U.S. 944 (1982); Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 280 (CA5 1981); Guidry v. Continental Oil Co., 640 F.2d 523, 528 & n. 14 (CA5 1981), cert. denied, 454 U.S. 818 (1981); Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452 (CA5 1980); Brown v. ITT Rayonier, Inc., 497 F.2d 234, 237 n. 2 (CA5 1974); Cox v. Otis Engineering Corp., 474 F.2d 613, 613 (CA5 1973); Barrios v. Louisiana Construction Materials Co., 465 F.2d 1157, 1161 (CA5 1972); Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958 (CA5 1971); Bodden v. Coordinated Caribbean Transport, Inc., 369 F.2d 273, 274 (CA5 1966). In Bouvier v. Krenz, 702 F.2d 89, 90 (CA5 1983), the court explained that the "permanent assignment/substantial work" test and the "more or less permanent connection" test are "essentially equivalent." See also David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 448-49 (1993) ("Permanent assignment and substantial work are alternative grounds; either will satisfy the criterion. Indeed the courts often collapse the two into a 'more or less permanent connection' standard.") (Italics omitted)

as an analytical starting point instead of a self-executing formula."[102] Jurists in the Fifth Circuit pointed out that the seaman status law of the Fifth and Second Circuits was the same in this respect:

> The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time.[103]

All that was meant by the "permanency" criterion in either circuit was that "the relationship between the individual and a particular vessel[104] must be substantial in point of time and work, nor merely sporadic."[105]

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[102] Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 261 (CA5 1981) (citing four other cases).

[103] Porche v. Gulf Mississippi Marine Corp., 390 F.Supp. 624, 631 (E.D.La.1975) [Rubin, J., citing Weiss v. Central R.R. Co. of New Jersey, 235 F.2d 309 (CA2 1956)].

[104] As the court below pointed out, a suitable relationship between the individual and a fleet (identifiable group) of vessels would also suffice. See 20 F.3d at 53 & n. 3, J.A. 233 & n. 3. Petitioner's Brief on the Merits is mistaken in asserting (at p. 25) that the "genesis" of the fleet doctrine was Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (CA5 1983), cert. denied, 464 U.S. 1069 (1984). The fleet doctrine was born in Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523 (CA5 1960); it was expanded in *Bertrand*. See David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, p. 97 & n. 110, pp. 109-112 (1985).

[105] Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 261 (CA5 1981).

The *Barrett* decision took the law of the Fifth Circuit away from its prior approach and away from the law of the Second Circuit.[106] Since 1986 the Fifth Circuit's permanent assignment/substantial work test has become a narrowly temporal, purportedly "self-executing formula"[107] of the very sort so vigorously eschewed by the earlier decisions. As the court below noted,[108] the most dramatic proof of this development is the decision in *Bach v. Trident Steamship Co.*, 920 F.2d 322 (CA5 1991), vacated, 500 U.S. 949 (1991), reinstated, 947 F.2d 1290 (CA5 1991), cert. denied, 112 S.Ct. 1996 (1992). The *Bach* court denied seaman status to a compulsory Mississippi River pilot whose sole job was navigating oceangoing vessels on the river between New Orleans and Pilottown, near the mouth of the river. The court acknowledged that "Bach's case for seaman status has considerable intuitive appeal for two reasons: (i) his entire job was to perform an

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[106] Judge Rubin's dissent in *Barrett v. Chevron, U.S.A. Inc.*, 781 F.2d 1067 (CA5 1986) joined by five other judges, would have kept the former view in place: "[A worker's] status as a crew member, vel non, should be determined by considering the transitory duration or fixed term of the assignment, the nature of his duties during it, and the relationship of those duties to the mission of the vessel. * * * An assignment to work as a crew member, like the voyage of a vessel, may be brief, and the *Robison* test is applicable in deciding the worker's status during any such employment." 781 F.2d at 1077. In an earlier decision written while he was a district judge, Judge Rubin had expressed the same view, citing in support of it the Second Circuit's decision in Weiss v. Central R.R. Co. of New Jersey, 235 F.2d 309 (CA2 1956). Similarly, Judge Oakes in the decision below relied upon *Weiss*. See 20 F.3d at 53-54, J.A. 235.

[107] See text at note 102 supra.

[108] 20 F.3d at 56, J.A. 241-42.

archetypical seaman function, the steering of an oceangoing vessel through navigable waters; and (ii) in performing his job, Bach regularly faced many of the hazards of life on the sea and the risks created by moving vessels through navigable waters."[109] Nevertheless, his lack of "the requisite [permanent] connection to a vessel or identifiable fleet of vessels"[110] kept him out of the seamen's legal protections: "[W]e have never held that seaman status is coextensive with exposure to seaman's risks."[111]

Cutting one who performs an "archetypical seaman function" and routinely undergoes the classic seamen's hazards out of the protection of the Jones Act on the basis of a narrowly temporal, more or less mechanically quantitative approach is fundamentally inconsistent with this Court's decision in *Wilander*, which stressed that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed."[112] The Second Circuit's test for seaman status would not countenance such a counter-intuitive and facially unfair outcome as the *Bach* case,[113] and is much to be preferred.

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[109] 920 F.2d at 324.

[110] 920 F.2d at 325.

[111] 920 F.2d at 325.

[112] 498 U.S. at 354.

[113] See Clark v. Solomon Navigation, Ltd., 631 F.Supp. 1275 (S.D.N.Y. 1986) (treating compulsory river pilot as seaman entitled to sue vessel for unseaworthiness). See also Ringering v. Compania Maritima De-La-Mancha, 670 F.Supp. 301 (D.Ore. 1987), aff'd, 848 F.2d 1243 (CA9 1988) (same). Cf. Evans v. United Arab Shipping Co. S.A.G., 4 F.3d 207 (CA3 1993), cert. denied, 114 S.Ct. 1065 (1994) (holding that a compulsory pilot is not an employee of the vessel for purposes of the Jones Act but

The Fifth Circuit now uses an approach to determining seaman status that tries unsuccessfully to be mechanically quantitative in perhaps three different senses. First, as indicated above, the permanent assignment/substantial work criterion has become narrowly temporal and quantitative; the sole measure is the percentage of work time the employee spent aboard a vessel or fleet.[114] Second, the definition of a "fleet" seems to entail a requirement that the number of vessels "acting together or under one control"[115] must be relatively small.[116] Third, in

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rather an independent contractor, and declining to reach the issue of seaman status). Cf. David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 451-52, 454-59 (1993) (criticizing the Fifth Circuit's *Bach* decision and arguing that compulsory pilots should be held to be seamen who are not employees of the shipowner; this resolution would entitle them to the warranty of seaworthiness but exclude them from the Jones Act and the law of maintenance and cure). But see Harwood v. Partredereit AF 15.5.81, 944 F.2d 1187 (CA4 1991), cert. denied, 112 S.Ct. 1265 (1992) (denying seaman status to compulsory pilot).

[114] See e.g. Palmer v. Fayard Moving and Transportation Corp., 930 F.2d 437, 439 (CA5 1991) (denying seaman status to shipowner's public relations agent, injured aboard ship, who spent only 19% of her work time on the vessel); Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1076 (CA5 1986) (denying seaman status to welder's helper who performed 20-30% of his duties on vessels).

[115] *Barrett*, supra, 781 F.2d at 1074.

[116] See e.g. Campo v. Electro-Coal Transfer Corp., 970 F.2d 51, 52 (CA5 1992), cert. denied, 113 S.Ct. 1261-62 (1993) (rejecting the concept of a "six- or seven-thousand-vessel fleet"); Ardleigh v. Schlumberger Ltd., 832 F.2d 933, 934 (CA5 1987) (worker did 70% of his work on thirty different vessels; seaman status denied); Lirette v. N.L. Sperry Sun, Inc., 831 F.2d 554, 555-56 (CA5 1987) (denying

defining a "vessel" for purposes of the "member of a crew of any vessel" inquiry, the Fifth Circuit has begun using a prolix, elaborate, and ultimately highly ambiguous doctrinal apparatus[117] involving three "common attributes for nonvessels"[118] and "nine factors for vessel status."[119]

All of these cross-cutting efforts at quantification have produced something like chaos. Many pairs of Fifth Circuit decisions are facially inconsistent with one another.[120] There is a steady chorus of criticism in the law reviews,[121] to the effect that the Fifth Circuit's seaman

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seaman status to a worker who spent 75-80% of his time on twenty-three different floating drilling rigs); Langston v. Schlumberger Offshore Services, Inc., 809 F.2d 1192, 1194 (CA5 1987) (denying seaman status to a worker who spent 32% of her work time on fifteen vessels owned by ten unrelated owners).

[117] See the detailed explanation and criticism of this body of doctrine in David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 460-65 (1993); David W. Robertson, The Law of Seaman Status Clarified, 23 J. Mar. L. & Comm. 1, 11-16 (1992).

[118] Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 293 (CA5 1990).

[119] Id. at 294 n. 9.

[120] Compare e.g. Ducote v. V. Keeler & Co. Inc., 953 F.2d 1000 (CA5 1992), with Ellender v. Kiva Construction & Engineering, Inc., 909 F.2d 803 (CA5 1990). Also compare Ardleigh v. Schlumberger Ltd. 832 F.2d 933 (CA5 1987), with Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240 (CA5 1983), cert. denied, 464 U.S. 1069 (1984).

[121] See generally David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443 (1993); David W. Robertson, The Law of

status jurisprudence provides woefully little real guidance to lawyers and trial judges. One experienced practitioner, whose work is primarily in behalf of shipowners and similarly situated maritime defendants, has recently written:

> The *Barrett* test has proven to be clumsy, imprecise, and subject to considerable judicial gymnastics. Not only is it unpredictable, it has also caused a great deal of agonizing discovery and evidentiary battles over percentages of work by a given employee over long periods of time involving, in many cases, different jobs and vessels.[122]

This experienced maritime defense lawyer went on to state that the Fifth Circuit's jurisprudence on the definition of a vessel is similarly convoluted:

> Like the seaman status struggle, [the Fifth Circuit's approach to setting criteria for defining a vessel] has often been a confusing and tortured exercise in mental gymnastics.[123]

Seaman Status Clarified, 23 J. Mar. L. & Comm. 1 (1992); Kenneth G. Engerrand, Seaman Status Reconstructed, 32 So. Tex. L. Rev. 169 (1991); Eileen R. Madrid, Seaman Status: The Supreme Court Recharts its Course: *Wilander* and *Gizoni*, 51 La. L. Rev. 1149 (1991); Honorable Peter Beer, Keeping Up With the Jones Act, 61 Tulane L. Rev. 379 (1986); David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985); Kenneth G. Engerrand and Jeffrey R. Bale, Seaman Status Reconsidered, 24 So. Tex. L.J. 431 (1983).

[122] Jack L. Allbritton, Seaman Status in *Wilander's* Wake, 68 Tulane L. Rev. 373, 388-89 n. 110 (1994).

[123] Id. at 392. See also Id. at 397-402 (further detailing Fifth Circuit difficulties and confusion).

Seasoned district judges within the Fifth Circuit – some of whom are reported to have been involved with as many as thirteen thousand Jones Act filings over a ten year period[124] – are openly critical of the Circuit's lack of a meaningful or workable test for seaman status.[125]

V. PLAINTIFF'S RESPONSES TO SPECIFIC ARGUMENTS IN DEFENDANT'S MERITS BRIEF TO THIS COURT.

A. The "Plain Error" Point

Defendant/Petitioner's Brief on the Merits (pp. 12-14) appears to argue that this Court should limit its consideration of this case to deciding whether any error

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[124] See Honorable Peter Beer, Keeping Up With the Jones Act, 61 Tulane L. Rev. 379, 400 (1986).

[125] See e.g. Godeaux v. Dynamic Industries, Inc., 864 F. Supp. 614, 617 fn. 4 (E.D. Tex. 1994): "While the Robison test may appear uncomplicated and straightforward, its application and interpretation under seemingly similar fact scenarios have resulted in different outcomes" (citing cases). See also Judge Peter Beer's law review article, Keeping Up With the Jones Act, 61 Tulane L. Rev. 379 (1986). Judge Beer's article focuses on the pre-*Barrett* situation in the Fifth Circuit but states that *Barrett* is merely a "faintly perceptible swerve from the Circuit's prior jurisprudence." (p. 412). The Beer article is a veritable diatribe against the Fifth Circuit's law of seaman status, with the author referring to the Fifth Circuit Court as "intimidated" (p. 395), "timid and uncertain" (p. 396), prone to "eager judicial legislation" and "melodramatic prose" (p. 398). Judge Beer calls the Fifth Circuit's seaman status jurisprudence "tenuous" and "transitory" (p. 406) and sums the matter up thusly: "The current judicial definitions of seaman's status are a travesty that have tarnished the very forums in which the Jones Act is sought to be enforced." (p. 414).

in the trial court's charge to the jury was "plain" enough to warrant appellate review in light of plaintiff's failure to object to the charge as a whole.[126]

This point was not raised or even mentioned in the Petition for Writ of Certiorari; indeed, it is quite inconsistent with the Petition for Writ of Certiorari's presentation of this case as a vehicle for clearing up conflict and confusion in the law of seaman status. Plaintiff objects to defendant's attempt to inject the "plain error" issue at this stage and suggests that the issue is not properly before the Court.

Furthermore, it would "serve neither to promote the interests of justice nor to advance efficient judicial administration"[127] for this Court to limit itself to deciding whether plain error was committed in the present case. As was noted in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 257 (1981), when an important and recurrent question of federal law has been fully briefed and argued in the Court of Appeals and fully briefed in this Court, "the interests of justice" and "efficient judicial administration" are often better served by the Court's giving plenary attention to the disputed substantive-law point.

In any event, the court below amply explained that the trial court's error was indeed "plain." By focusing the jury "solely on . . . Latsis's temporal relationship with the vessel" the trial judge caused "substantial prejudice" to

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[126] As indicated above, plaintiff did object to the "drydock" instruction.

[127] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 257 (1981).

Latsis.[128] "This prejudice was compounded by the district court's further instruction that the time the vessel was in drydock could not be considered."[129] Moreover, charging the jury in terms of Latsis's "assignment" rather than "connection" to a vessel "might have been particularly confusing to the jury because Latsis was not 'assigned' to the S.S. Galileo except temporarily from time to time. Rather he was responsible for a fleet of vessels as to which it has long been held a person may be a seaman."[130] Taken as a whole, the instructions given by the district judge narrowly "limited the jury's consideration to Latsis's temporal relation to the vessel. This substantially prejudiced Latsis."[131] "[T]he district court's instruction erroneously applied the law of this circuit regarding a core element of Latsis's claim – to the substantial prejudice of Latsis."[132]

The instructions were therefore subject to review and reversal under the "plain error" standard.

B. The Argument that the Court Below Invaded the Jury's Province

Defendant/Petitioner's Brief on the Merits (at pp. 9, 11) argues that the decision below should be reversed

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[128] 20 F.3d at 46, J.A. 217. See also 20 F.3d at 52, J.A. 232: "[T]he 'more or less permanent connection' formulation of the substantial connection requirement remains the law of this circuit. Therefore it was plain error for the district court to ignore this formulation and adopt the formulation of the Fifth Circuit. . . . "

[129] Id.

[130] 20 F.3d at 53 n. 4, J.A. 234 n. 4.

[131] 20 F.3d at 54, J.A. 237.

[132] 20 F.3d at 54-55, J.A. 238.

because it constitutes a "rebuke of the role of the jury" (p. 9) as that role was described in *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355-56 (1991). In this respect defendant again misreads the *Wilander* opinion. The *Wilander* Court described the Jones Act jury's role as "applying the proper legal standard" to the seaman status issue. 498 U.S. at 356. The court below concluded that the trial court failed to furnish the jury with "the proper legal standard." Obviously a reversal and remand for a new trial under such circumstances cannot properly be regarded as invading the jury's legitimate province.

C. Defendant's Reliance on Out-of-Context Language

In discussing the conscientious effort of the court below to follow this Court's *Wilander* decision, plaintiff demonstrated above (in Section IV-A) that Defendant/Petitioner's Brief on the Merits is mistaken in taking *Wilander's* "land-based" language wholly out of context. Much the same demonstration is appropriate respecting Petitioner's Brief's reliance (at pp. 19-20) on "permanent connection" language taken out of context from this Court's decisions in *Wilander*, *Norton v. Warner Co.*, 321 U.S. 565 (1944), *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), and *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991).

Perhaps the first thing to note is that virtually no present-day member of the United States Merchant Marine could qualify as a seaman under the kind of "permanent connection" requirement defendant would have this Court adopt. John McPhee's remarkable book *Looking for a Ship* (Farrar Straus Giroux 1990) is a vivid demonstration that the

modern American merchant seaman seldom stays long with a single ship or employer; these men typically have short stints aboard a variety of ships. See especially pp. 4, 9, 10, 11-12 and 20-21, attached to this brief as Appendix B.

None of this Court's decisions furnishes the slightest support for defendant's proposed version of a "permanent connection" requirement. *Wilander* used the word "permanent"[133] in a quotation from *Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192, 193 (CA5 1938), which held that a general laborer who worked eight hours a day on a harbor dredge and then went home each night was a seaman. In *Norton* this Court applied the term "permanent attachment"[134] to a man whose "duties consisted of taking general care of [a] barge" that "never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia."[135] *Senko* used the language of "permanently attached"[136] to refer to a "handyman on a dredge anchored in a navigable river. His duties included general maintenance when the dredge was stationary. It moved infrequently, and had never moved during all the time [the *Senko*] plaintiff was working. Plaintiff lived ashore, went home every night, and was hurt while working ashore."[137] The "permanently attached" language in *Herb's Welding*[138] was a reference to a generic description of the relaxed "more or less permanent connection" jurisprudence of the Fifth Circuit in the pre-*Barrett*

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[133] 498 U.S. at 355.

[134] 321 U.S. at 573.

[135] Id. at 567.

[136] 352 U.S. at 372.

[137] David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, 89 (1985).

[138] 470 U.S. at 417 n. 2.

era.[139] Finally, the *Gizoni* Court used the language of "relationship and permanent"[140] to refer to a shipyard worker's connection to the group of floating platforms he sometimes rode as they moved short distances among vessels under repair at berths or in drydock at the ship repair facility. Like the workers who were classified as seamen in *Butler v. Whiteman*, 356 U.S. 271 (1958) (*per curiam*), *Maryland Casualty Company*, and *Senko*, the *Gizoni* plaintiff had a valid claim to seaman status despite being involved with vessels only at the shoreside and going to a safe home ashore each night.

Clearly none of the decisions from which defendant has gleaned the "permanent connection" language furnishes any support for cutting Mr. Latsis out of the seamen's protections. All of them used the language of permanency in the relaxed sense of the "more or less permanent connection" jurisprudence relied upon by the court below.

D. Defendant's Proposed Test for Seaman Status

Relying in major part on David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985), Defendant/Petitioner's Brief on the Merits (at pp. 22-28) proposes a seaman status test that would focus

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[139] See the discussion of that jurisprudence at text and notes 101-105, supra. The *Herb's Welding* Court used the word "permanent" in reference to the description of the Fifth Circuit's pre-*Barrett* jurisprudence in David W. Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Texas L. Rev. 973, 982-92 (1977).

[140] 112 S.Ct. at 490.

centrally on the putative seaman's exposure to the dangers characteristic of seamen's work. Plaintiff Antonios Latsis largely agrees with the defendant's proposal. The defendant's proposed test is remarkably similar to the test laid down by the court below. Perhaps it would be helpful to view them side by side:

Test set forth by court below:	*Defendant's proposed test:*
[T]he test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.[141]	A maritime worker is a seaman if the worker: (1) has a permanent employment connection to a vessel in navigation or performs a substantial part of his work on a vessel while exposed to marine perils *at sea* or to the dangers attendant to the movement of vessels on navigable waters; and (2) contributes to the function of the vessel or the accomplishment of its mission.[142]

A jury could readily find that Mr. Latsis was a seaman under either of those tests. He performed substantial

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[141] 20 F.3d 47, J.A. 245.

[142] Petitioner's Brief on the Merits at 28; emphasis in original

work on the S.S. Galileo and the other vessels in the Chandris fleet while being exposed to perils of the sea and vessel movement dangers; his contribution to the vessels' function or mission was substantial in terms of both duration and nature; and he was in fact injured by a peril of the sea.

This Court's unanimous *Wilander* opinion states that the policy of the Jones Act is to protect workers against "those particular perils" faced by "[a]ll who work at sea in the service of a ship." 498 U.S. at 354. No one seems to dispute what those "particular perils" are. Even the Fifth Circuit's highly controversial *Bach* decision (discussed supra at notes 108-13), acknowledged that what makes seamen distinctive is their exposure to "the hazards of life on the sea and the risks created by moving vessels through navigable waters." 920 F.2d at 324.[143] In Professor Robertson's most recent law review article on the problem of seaman status, he again urges that "[c]ourts and counsel should begin focusing on [the] policy [of protecting workers against the characteristic seamen's dangers] and making it an explicit part of their doctrinal formulations."[144] Both defendant Chandris in its brief to this Court and the Second Circuit in its opinion below

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[143] In a passage quoted approvingly in Petitioner's Brief on the Merits (at p. 22) and cited approvingly by this Court in *Wilander*, 498 U.S. at 354, David W. Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79, 80-81 (1985), identified the "characteristic seamen's dangers" as "perils of the sea" and the "risks attending the movement of vessels on navigable water."

[144] David W. Robertson, Continuing Issues in the Rights of Injured Maritime Workers in the Wilander-Gizoni Era, 24 Rutgers L.J. 443, 446 (1993).

have heeded that call. If this Court chooses to use the present case as an opportunity to further clarify the law of seaman status, it can greatly assist lawyers and trial courts by setting forth an "exposure-to-seamen's-dangers" test in unequivocal terms. Plaintiff Latsis submits that in that respect the formulation of the court below is eminently suitable for adoption, provided it be understood that the phrase "hazards of the sea" is a term of art encompassing both deep-sea perils and the dangers incident to the movement of vessels on navigable water.

VI. PLAINTIFF'S RESPONSES TO THE AMICUS CURIAE BRIEFS SUPPORTING THE DEFENDANT.

A. Telling the Jones Act Jury About the Longshore Act

The main argument in the amicus brief filed by TECO Transport *et al.* is that Jones Act juries should be told that if they deny seaman status the injured worker will still be entitled to benefits under the Longshore and Harbor Workers' Compensation Act. See the TECO Amicus brief at pp. 4, 9, 14, 18, 20-22. This argument was not raised in any form in either of the courts below or in the Petition for Writ of Certiorari; on that basis alone, this Court should not consider it.

Furthermore, the amicus brief fails to inform the Court that in order to adopt TECO's proposed requirement the Court would have to overrule or drastically limit *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963). In *Tipton* this Court established that it is reversible error for a court in a seaman status case to admit evidence that the

plaintiff has accepted Longshore Act benefits; letting the jury know that a putative seaman "has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act"[145] was highly prejudicial. It is significant that in the recent *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486, 493 (1991), this Court cited *Tipton* with apparent full approval.

B. Letting the Ship's Log Control

The amicus brief filed by the City of New York makes a fundamental conceptual error (at pp. 4, 8) in characterizing the seaman status issue as going to the district court's subject matter jurisdiction. As Justice Frankfurter pointed out in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959), this is a frequent error, but an error nonetheless: "[Plaintiff] asserts a substantial claim that the Jones Act affords him a right of recovery for the negligence of his employer. Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights."

More importantly, the test for seaman status proposed in the City's amicus brief (at pp. 6, 23-29) – to treat as seamen only those listed as crew members on the vessel's log – would be absurdly narrow and would run afoul of one of the first principles in the seaman status jurisprudence: "[E]mployers cannot [be permitted to] prevent seamen from recovering under the Jones Act by

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[145] 375 U.S. at 35 (disapprovingly quoting defendant's counsel's argument to the jury).

[clever contractual or bookkeeping arrangements such as] by assigning them to different vessels or by making arrangements with third parties concerning the operation or navigation of the vessels upon which they serve." *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 248 (CA5 1983), cert. denied, 464 U.S. 1069 (1984).

CONCLUSION

The decision below – remanding this case for a new trial on Mr. Latsis's Jones Act claim – should be affirmed but modified to provide that Latsis was a Jones Act seaman as a matter of law. In the alternative, the decision below should be affirmed and the case remanded for a new trial under proper instructions to the jury on the issue of Latsis's status as a Jones Act seaman.

Respectfully submitted,

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APPENDIX A

DECISIONS OF LOWER FEDERAL COURTS BROADLY SUPPORTIVE OF THE VIEW THAT ANY WORKER ASSIGNED TO A VESSEL FOR THE DURATION OF A VOYAGE AND WHOSE DUTIES CONTRIBUTE TO THE VESSEL'S MISSION IS A SEAMAN RESPECTING INJURIES INCURRED ON THAT VOYAGE.

First Circuit

DiGiovanni v. Traylor Brothers, Inc., 959 F.2d 1119, 1123 (CA1), cert. denied, 113 S.Ct. 87 (1992): "[i]f a barge, or other float's 'purpose or primary business is *not* navigation or commerce,' then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit". Emphasis in original.

Second Circuit

Salgado v. M.J. Rudolph Corp., 514 F.2d 750, 755 (CA2 1975): The court upheld a bench trial determination that plaintiff was not a seaman and stated: "Salgado's presence on the R6 [a floating crane] was only for the purpose and duration of loading the freighter alongside."

Harney v. William H. Moore Building Corp., 359 F.2d 649, 655-56 (CA2 1966): The court held that a man whose job was to maintain cofferdam pumps on a stationary crane barge being used to build a bridge could be classified as a seaman.

Weiss v. Central Railroad Co. of New Jersey, 235 F.2d 309, 312 (CA2 1956): Upholding a bench trial determination that a

ferry deckhand was a seaman, the court stated: "We recognize that to be considered a 'seaman' for purposes of recovery under the Jones Act . . . the nature of a claimant's duties aboard a vessel is not controlling and that he need not be serving in a strictly navigational capacity." Citation omitted. Still, we know of no case where an employee whose duties consisted of actually operating the wheel of a vessel has been denied the designation of 'seaman,' as traditionally and universally associated with his position." Citation omitted.

United States v. Atlantic Transport Co., 188 F. 42, 43 (CA2 1911), cert. denied, 223 U.S. 724 (1911): "These 'horsemen,' like all others who sign a ship's articles for a voyage or a succession of voyages, being part of the ship's company, may be considered as seamen."

The J.S. Warden, 175 F. 314, 315 (S.D.N.Y.1910): Judge Learned Hand classified a bartender as a seaman and explained that all who "equally further the purpose of [a ship's] voyage" are entitled to the seamen's protections.

But see *Kollias v. Bay Tankers, Inc.*, 742 F.2d 1441 (CA2 1984), cert. denied, 469 U.S. 1073 (1984): This was an unreported decision, not permitted to be cited or relied upon under the Second Circuit's rules, that apparently upheld the denial of seaman status to a repairman who was hurt while on a voyage from Galveston, Texas, to Long Beach, California. See the discussion of *Kollias v. Bay Tankers* in *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 75 (CA2 1994) (upholding Longshore Act coverage) (cert. petition pending).

Third Circuit

Reeves v. Mobile Dredging & Pumping Co., Inc., 26 F.3d 1247, 1251 (CA3 1994): The court denied seaman status to a worker assigned to a dredge on a non-navigable lake strictly because it *was* a non-navigable lake. The court laid down a new test for seaman status designed to take *Wilander* into account, to wit: "[F]or Reeves to establish himself as a seaman, he must demonstrate that at the time of his injury: (a) he maintained a more or less permanent connection on (b) a vessel in navigation; and (c) that his employment contributed to the function of the vessel or the accomplishment of its mission."

Fourth Circuit

Harwood v. Patredereit A.F. 15.5.81, 944 F.2d 1187, 1192 (CA4 1991), cert. denied, 112 S.Ct. 1265 (1992): Denying seaman status to a compulsory pilot hurt trying to board a Danish ship to pilot her into Hampton Roads, the court relied on the Fourth Circuit's pre-*Wilander* test for seaman status requiring that "1) the worker must be more or less permanently attached to a vessel or fleet; 2) the worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and 3) the vessel must be in navigation."

Fifth Circuit

Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 243, 245, 248 (CA5 1983), cert. denied, 464 U.S. 1069 (1984): Upholding seaman status for workers who performed "classical seaman's work" on a miscellany of

small boats on very short voyages, the court relied in major part on the fact that each of "plaintiffs' tour[s] of duty with a vessel was for the duration of the vessel's mission."

Roberts v. Williams-McWilliams Co., Inc., 648 F.2d 255, 262 (CA5 1981): "Roberts was apparently expected to stay aboard the barge until completion of the project."

Ardoin v. J. Ray McDermott & Co., 641 F.2d 277, 281-82 (CA5 1981).

Davis v. Hill Engineering, Inc., 549 F.2d 314, 328 n. 23 (CA5 1977): "Davis . . . continued his work on Hill's fabrication project after the onshore phase was completed by boarding the W-701 for the duration of the project."

Porche v. Gulf Mississippi Marine Corp., 390 F.Supp. 624, 630 (E.D.La.1975): Judge Rubin held that a worker who had never been to sea before and who died on his first day of work while trying to board the pipe-lay barge to which he had been assigned was a seaman as a matter of law. He explained: "The decedent was to serve aboard the RB-2 as a temporary replacement; his service, however, was to be for an indefinite period of time – until the regular welder was able to return. This uncontradicted evidence establishes that the decedent's connection was 'more or less permanent.' The requirement of a relatively permanent tie to the vessel is meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for only a relatively short period of time. See Weiss v. Central R.R. Co. v. New Jersey, 2d Cir. 1956, 235 F.2d 309.".

Sixth Circuit

Hatch v. Durocher Dock and Dredge, Inc., 33 F.3d 545, 547 (CA6 1994): The court adopted the rule of the First Circuit's *DiGiovanni*, supra.

Seventh Circuit

Rufolo v. Midwest Marine Contractor, Inc., 6 F.3d 448, 453 (CA7 1993), vacated on other grounds, 114 S.Ct. 1609 (1994): The court held that a pilot on a spud barge being moved from Kenosha, Wisconsin, to Evanston, Illinois, was a Jones Act seaman.

Eighth Circuit

Roth v. U.S.S. Great Lake Fleet, Inc., 25 F.3d 707, 708, 709 (CA8 1994): Denying seaman status to a temporary worker hired to paint Great Lakes ships laid up for the winter, the court explained that the worker "had no expectation that he would ship out when the ships eventually left the dock after the spring thaw." The court adopted a test for seaman status requiring that "1) the injured worker must perform at least a substantial part of his work on any floating structure used for transport in navigable waters; and 2) his work must contribute to the function of the vessel or the accomplishment of its mission.".

Ninth Circuit

McKinley v. All Alaskan Seafoods, Inc., 980 F.2d 567, 569 (CA9 1992): The court denied seaman status to a worker hurt in a shipyard fire aboard the hull of an oil drill ship

being converted to a fish processing ship on the view that the vessel was not in navigation. The court set forth a test for seaman status requiring that "(1) the vessel on which the claimant was employed must be in navigation; [and] (2) the claimant must have a more or less permanent connection with the vessel. . . . "

Ringering v. Compania Maritima De-La-Mancha, 670 F.Supp. 301 (D.Ore.1987), aff'd, 848 F.2d 1243 (CA9 1988): The court treated a Columbia River pilot as a Jones Act seaman.

Eleventh Circuit

O'Boyle v. United States, 993 F.2d 211, 213-14 (CA11 1993): The court denied seaman status to an American biologist required by treaty to be carried as observer on a Japanese driftnet fishing ship because the biologist "was not performing the ship's work nor furthering its purpose." The court set forth a test for seaman status requiring that the worker "(1) . . . must have a more or less permanent connection with (2) a vessel in navigation and (3) the capacity in which he is employed . . . must contribute to the function of the vessel. . . . "

APPENDIX B

EXCERPTS FROM JOHN McPHEE'S *LOOKING FOR A SHIP* (FARRAR STRAUS GIROUX 1990)

The older the card [date stamped upon leaving the last ship], the better the prospects for a new job. If the card were to go twelve months unused, it would roll over – lose all seniority, and begin again. In the evolving decline of the United States Merchant Marine, qualified people seeking work so greatly outnumbered the jobs there were to fill that you almost had to hold a killer card or your chances were slim for shipping out. You went to a union hall, presented the card in person at a job call, and if someone tossed in an older card you stayed on the beach. *Id.*, p. 4.

* * *

. . . by terms then set by the union, the six months of work were followed by six of obligatory vacation.

And then another six of utter frustration looking for a ship. . . . [A third mate] needed work so badly that he signed up as an able-bodied seaman on an integrated tug-barge operating between Perth Amboy and Duluth. He was a licensed officer of ocean ships on his way to the Great Lakes as a deckhand on a barge.

To provide jobs of any kind for its increasingly distressed mariners, the Masters, Mates, and Pilots union arranged for five oceangoing tankers to be crewed with union members, right down to the last deckie. Licensed officers accepted jobs as ordinary seamen, able-bodied seamen, and bosuns because they could not get other work. *Id.*, p. 9.

* * *

The United States Merchant Marine, the name of which suggests an assault on a valuable foreign beach, is not, as a good many people seem to think, a branch of the military service. It is essentially a collective enterprise of competing private companies, flying the American flag on the sterns of their ships, employing American-citizen crews, and transporting cargoes throughout the world. Sail and steam, the United States grew in rank among nations on the aggressive reach of its Merchant Marine. American merchant ships once numbered in the thousands. *Id.*, p. 10.

* * *

Diminishing rapidly, the number of American dry-cargo ships was already below two hundred, and there were about as many tankers. Not one commercial vessel was under construction in an American shipyard.

In time of war, the Merchant Marine is a prominent participant. . . . Afterward, the ships go out of service more rapidly than the sailors, and jobs are hard to come by. The unions close their membership books until numbers level out. By the late nineteen-seventies, the Second World War crowd was gone, and much of the Vietnam crowd. Books opened. . . . In the mid-eighties, 'everything slammed shut again' as the United States Merchant Marine was competitively out-bid by ships under foreign flags and was reduced to carrying less than five per cent of all oceangoing American cargo. One American company after another entered Chapter 11 with its keel up and its screws in the air. Soon the Soviet merchant fleet was carrying at least ten times as much

American cargo as the United States Merchant Marine, in direct trade between the two countries – a multiple that keeps growing through time. *Id.*, pp. 11-12.

* * *

Captains and most chief mates are 'permanent.' They take enforced vacations like everybody else – but at the owners' behest – they return to their specific ships. With rare exceptions, no second mates or third mates are permanent. Many unlicensed personnel have permanent jobs; most do not. *Id.*, pp. 20-21.